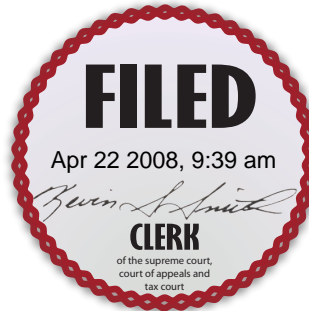


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

NANCY OLIVARES
Syracuse, Indiana

ATTORNEY FOR APPELLEE:

JAY L. LAVENDER
Lavender & Bauer, P.C.
Warsaw, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

NANCY OLIVARES,

Appellant-Defendant,

vs.

CAROL WHITE,

Appellee-Plaintiff.

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No. 43A03-0708-CV-377

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Joe V. Sutton, Judge
The Honorable David C. Cates, Judge Pro Tempore
Cause No. 43D03-0403-SC-687

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Nancy Olivares, pro se,¹ appeals the small claims court's judgment entered against her in an action filed by Carol White.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in denying Olivares' motion for a change of venue.
2. Whether the trial court erred in denying Olivares' motion for summary judgment.
3. Whether the trial court abused its discretion in denying Olivares' requests for discovery.
4. Whether the trial court abused its discretion in granting a continuance of the trial.
5. Whether David Cates, Judge Pro Tempore, improperly presided at trial.
6. Whether the trial court abused its discretion in admitting evidence.
7. Whether the trial court erred in not ruling on Olivares' motion to correct error.

FACTS

Some time prior to July 18, 2003, Olivares and White entered into a purchase agreement for the purchase of real property (the "Real Estate") owned by Olivares. On or

¹ We note that Olivares' brief fails to comply with Indiana Appellate Rules 46(A)(5), (6), (7), and (8). "It is well settled that pro se litigants are held to the same standard as are licensed lawyers." *Goossens v. Goossens*, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).

about July 18, 2003, Olivares and White entered into an agreement (the “Tax Agreement”) in order to facilitate the sale of the Real Estate.²

Pursuant to the Tax Agreement, Olivares agreed to credit White “\$750.18 against the sales price of the Real Estate for any additional taxes for 2002 payable 2003.” (App. 2). Due to a delayed assessment, however, the \$750.18 did not represent the actual property tax liability for 2002. Thus, in the event the assessment resulted in higher property tax liability, Olivares agreed to pay White “the amount by which the additional taxes exceeds the credit.” (App. 2). If the assessment resulted in a lower property tax liability, White agreed to reimburse Olivares “the amount by which the credit exceeds the additional taxes.” (App. 3).

On May 27, 2004, White filed a notice of claim against Olivares in the Kosciusko County Superior Court, Small Claims Division. White claimed that pursuant to the Tax Agreement, Olivares owed her \$771.66 and sought a judgment against Olivares in the amount of \$771.66 plus costs. The trial court set a pre-trial conference for July 16, 2004.

On June 15, 2004, Olivares filed her answer and counterclaim. The trial court vacated the pre-trial conference set for July 16, 2004 and set the matter for trial on July 16, 2004.

White filed her answer to Olivares’ counterclaim on July 1, 2004. On July 9, 2004, White sought to continue the trial. The trial court therefore continued the trial to August 24, 2004.

² It appears that due to a delay in the reassessment of the Real Estate for property tax purposes, the amount of property taxes due and payable would not be known prior to the settlement date, thereby delaying the date for closing on the Real Estate.

On July 12, 2004, Olivares filed a motion to change venue from Kosciusko County, pursuant to Indiana Trial Rule 76(A). Olivares asserted that she could “not obtain a fair trial in Kosciusko County Court inasmuch [sic] as the presiding Judge of Circuit Court One was attorney to the executor of her father’s estate and as such was patently partial to her siblings.” (App. 7). Olivares further argued that “[t]he Judge of Superior Court No. 1 presided over the estate of [Olivares’] mother and was actively biased against her” *Id.* Olivares also alleged bias in the handling of her daughter’s estate. Olivares also sought to continue the trial scheduled for July 16th. The trial court denied Olivares’ motion for change of venue. The trial court entered the following minute entry in the chronological case summary (the “CCS”): “The Court notes that the Judges mentioned in the Motion will not be hearing this case, and the presiding Judge in Superior Court No. 3 is not familiar with any of the parties.” (App. iii). The trial remained set for August 24, 2004.

On August 24, 2004, the parties filed a joint motion to continue the trial “without date.” (App. iii). Also on August 24, 2004, the parties filed a motion to dismiss Olivares’ counterclaim, without prejudice, which the trial court granted. On April 29, 2005, White requested a pretrial conference, which the trial court set for June 6, 2005. On June 2, 2005, White sought to continue the pretrial conference. On June 6, 2005, Olivares also sought to continue the pretrial conference. The trial court set the pretrial conference for June 27, 2005.

On June 16, 2005, Olivares filed an amended answer and counterclaim, in which Olivares denied owing White monies for tax payments. Rather, Olivares asserted that

White owed her \$86.58 and sought a judgment in the amount of \$286.58, which included costs.

On June 17, 2005, Olivares filed a cross claim against Chase Morgan-Bank One. Olivares subsequently filed a motion to dismiss, with prejudice, her cross claim against Chase Morgan-Bank. The trial court granted the dismissal on October 31, 2005.

On June 22, 2005, Olivares sought to continue the pretrial conference set for June 27, 2005. The trial court therefore continued the pretrial conference to July 26, 2005.

On July 21, 2005, Olivares filed a “Motion for Summary Judgment Against Carol White’s Claim; and, for Partial Summary Judgment on Nancy C. Olivares’ Counter Claim; and, for Severance,” which the trial court took under advisement. (App. 14). On July 26, 2005, the trial continued its pre-trial conference to August 23, 2005, to afford White time to respond to Olivares’ motion for summary judgment. On August 22, 2005, the trial court granted White an additional fourteen days to respond to Olivares’ motion for summary judgment. On August 23, 2005, Olivares filed a “Motion [f]or Leave [t]o Update Exhibit SJ3 [t]o Motion [f]or Summary [J]udgment,” which the trial court granted. (App. iv).

On August 23, 2005, the trial court held a pretrial conference. The trial court scheduled the trial for October 25, 2005 and set a hearing on all motions for October 25, 2005.

On September 19, 2005, Olivares filed her “Motion [f]or Discovery; And, Motion [t]o Shorten time within which to answer discovery matters served on . . . White and on Cross Defendant Chase Morgan-Bank One” (App. 25). The trial court denied

Olivares' motions, to which Olivares filed an objection and motion for clarification on October 11, 2005.

On October 13, 2005, the trial court entered the following minute entry into the CCS:

The Court clarifies it's [sic] ruling denying all discovery motions in that Small Claims Rule 6 requires the parties to seek approval to engage in discovery. There have been no requests from any of the parties to engage in discovery. Small claims should not be a litigious paper battle prior to trial. The parties were asked to appear at a pretrial conference to resolve the matter and if not resolved, appear at trial October 25, 2005

(App. v).

White and Olivares filed separate motions to continue the trial, which the trial court granted. The trial court therefore continued the trial to December 20, 2005. The trial court also set all pending motions for a hearing on December 20, 2005.

On November 15, 2005, Olivares filed a "Further Objection [t]o Denial [o]f Due Process, Motion [f]or Default [o]n Motion for Summary Judgment and Request [f]or Explicit Order [o]n Motion [f]or Continuance." (App. vi). The trial court denied Olivares' motion in all respects.

On December 12, 2005 and December 20, 2005, White and Olivares, respectively, filed motions to continue the trial. The trial court continued the trial to April 17, 2007.

On April 17, 2007, the trial court held a hearing and entered judgment against Olivares in the amount of \$771.66. David Cates presided as Judge Pro Tempore.

On May 16, 2007, Olivares filed a motion to correct error. The trial court extended the time by which White was required to respond to Olivares' motion to correct error to June 4, 2007.

On May 16, 2007, the trial court appointed David Cates as Judge Pro Tempore over the motion to correct error. Olivares filed an objection to Cates' appointment on May 29, 2007. The trial court stayed Cates' appointment on June 4, 2007.

On July 9, 2007, Olivares filed her "Motion [f]or Leave to File Supplement [t]o Correct Error and Supplement [t]o Motion [t]o Correct Errors." (App. viii). Also on July 9, 2007, the trial court granted both parties "through August 1, 2007 to complete filings." *Id.*

On July 30, 2007, Olivares filed her notice of appeal. Additional facts will be provided as necessary.

DECISION

1. Change of Venue

Olivares asserts that the trial court erred in denying her motion for change of venue from Kosciusko County. Specifically, Olivares argues that "in view of all the subsequent acts and/or omissions of due process denial perpetrated on [her] and of which the Court is charged with prior knowledge and disposition, the denial of the Motion is harmful, prejudicial error." Olivares' Br. 4.

A motion for change of venue is governed by Indiana Trial Rule 76, which provides, in pertinent part, as follows:

(A) In civil actions where the venue may be changed from the county, such change of venue from the county may be had only upon the filing of a verified motion specifically stating the grounds therefore by the party requesting the change. The motion shall be granted only upon a showing . . . that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party.

* * *

(C) In any action except criminal no change of judge or change of venue from the county shall be granted excepted within the time herein provided. Any such application for change of judge (or change of venue) shall be filed not later than ten [10] days after the issues are first closed on the merits.

“The party seeking to change venue has the burden to prove the existence of local prejudice or bias which prevents her from receiving a fair trial.” *Dolatowski v. Merrill Lynch, Pierce, Fenner & Smith*, 808 N.E.2d 676, 680 (Ind. Ct. App. 2004).

We will reverse a trial court’s ruling on a motion to change venue from the county only upon a showing of abuse of discretion. Ind. Trial Rule 76(A). “An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or where the trial court has misinterpreted the law.” *Skeffington v. Bush*, 846 N.E.2d 761, 762-63 (Ind. Ct. App. 2006).

Here, Olivares merely alleged in her motion for change of venue that one judge was “attorney to the executor of her father’s estate and as such was patently partial to her siblings” (App. 7); another judge was “actively biased against her in that she allowed the attorney for her siblings to be the counsel for the estate [of Olivares’ mother] and egregiously awarded said counsel exorbitant attorney fees . . .” (App. 7); “the Court subjected one of her others [sic] daughters . . . to loss of time and grief by scheduling

hearings and then not going forward with them” (App. 7-8); and “Superior Court No. 1 deprived [Olivares’] husband of an opportunity to show that evidence of an intervener [sic] was patently false by denying him rebuttal and argument.” (App. 8). Olivares, however, presented no evidence of the alleged prejudice or bias.

Furthermore, Olivares concedes that her motion for change of venue “was not filed within the time frame set by [Trial Rule 76]” Olivares’ Br. 4.³ Accordingly, we find no abuse of discretion in denying Olivares’ motion for change of venue.

2. Summary Judgment

Olivares asserts that the trial court erred in failing to rule on her motion for summary judgment.⁴ Namely, Olivares argues that “[t]he issue here is necessarily based on whether a party has a due process right to have a motion for summary judgment heard.”⁵ Olivares’ Br. 5.

We note that in her motion for summary judgment, filed on July 21, 2005, Olivares “waive[d] a hearing on [her motion for summary judgment] . . . UNLESS [White] insist[ed] on a hearing.” (App. 15). Furthermore, regarding summary judgment,

³ Generally, issues are first closed on the merits when the defendant files an answer. *Mann v. Russell’s Trailer Repair, Inc.*, 787 N.E.2d 922, 925 (Ind. Ct. App. 2003). Olivares filed her answer on June 15, 2004. Thus, pursuant to Trial Rule 76(C), Olivares was required to file her motion for change of venue no later than June 25, 2004. Olivares, however, did not file her motion until July 12, 2004.

⁴ The record reveals that on April 17, 2007, the trial court entered judgment in favor of White, thereby implicitly denying Olivares’ motion for summary judgment. *See Morton v. Moss*, 694 N.E.2d 1148, 1151 (Ind. Ct. App. 1998) (discussing the trial court’s implicit denial of motion for summary judgment where the trial court refused to rule on an unopposed motion for summary judgment and denied a request for a continuance of the trial).

⁵ Olivares seems to contend that had the trial court held a hearing, certain evidence “would have surfaced,” giving Olivares the opportunity “to have it stricken as unworthy or . . . rebut it at trial” Olivares’ Br. 5.

Trial Rule 56(C) provides, in pertinent part, as follows: “The court may conduct a hearing on the motion. However, upon motion of any party made no later than ten (10) days after the response was filed or was due, the court shall conduct a hearing on the motion”⁶ (Emphasis added). Thus, the trial court “may hold a hearing on a motion for summary judgment, but is not required to unless one of the parties requests a hearing.” *Logan v. Royer*, 848 N.E.2d 1157, 1162 n.6 (Ind. Ct. App. 2006).

Olivares fails to show that she requested a hearing, and in fact, Olivares explicitly waived a hearing on her motion for summary judgment. Thus, we cannot say that the trial court erred in not conducting a hearing on Olivares’ motion for summary judgment.

3. Discovery

Olivares asserts that she was denied due process because the trial court denied her discovery motions. Indiana Small Claims Rule 6 provides:

Discovery may be had in a manner generally pursuant to the rules governing any other civil action, but only upon the approval of the court and under such limitations as may be specified. The court should grant discovery only upon notice and good cause shown and should limit such action to the necessities of the case.

Thus, discovery in small claims matters is not an absolute right, but is within the discretion of the trial court. *See, e.g., Hlinko v. Marlow*, 864 N.E.2d 351, 353 (Ind. Ct. App. 2007) (“[T]he trial court has broad discretion in ruling on issues of discovery, and we will reverse the trial court only when that discretion has been abused.”).

⁶ Trial Rule 56(C) was amended effective January 1, 2006, prior to the trial court’s denial of Olivares’ motion for summary judgment.

Here, we cannot say that the trial court abused its discretion in denying Olivares' discovery motions, especially where Olivares did serve discovery requests on White and apparently did so without the trial court's approval.⁷ Olivares fails to establish that the trial court improperly limited discovery.

4. Continuance

Olivares asserts that the trial court erred in granting White a continuance of the trial. "[T]he decision to grant or deny a motion for continuance lies within the sound discretion of the trial court." *Hlinko*, 864 N.E.2d at 353.

Here, Olivares does not contest the continuance but rather the length of the continuance—sixteen months. The record reveals that on December 12, 2005, White filed a motion to continue the trial, which the trial court granted. On that same day, the trial court continued the trial to April 17, 2007. On December 20, 2005, Olivares filed her own motion to continue the trial. The trial court granted Olivares' motion and—as reflected by an entry in the CCS—reminded the parties that the trial had been continued to April 17, 2007. At no point did Olivares object to the new trial date.

"It is well settled that a question cannot be raised on appeal unless a proper and timely objection was made in the trial court." *Communications Workers of America, Locals 5800, 5714 v. Beckman*, 540 N.E.2d 117, 120 (Ind. Ct. App. 1989). Olivares made no objection to the new trial date. Thus, Olivares has waived this issue.

⁷ According to Olivares' "Objection [t]o Denial [o]f Due Process; [a]nd Motion [f]or Clarification [a]nd Reconsideration," (App. 28) filed on October 11, 2005, Olivares served discovery requests on White "as of September 16, 2005" *Id.* According to the CCS, White filed a notice of discovery compliance on August 16, 2004.

5. Judge Pro Tempore

Citing to Judicial Canon 3(E), Olivares asserts that David Cates improperly presided over the trial as judge pro tempore. Olivares contends that Judge Cates should have disqualified himself from hearing the matter in controversy because he had been associated with a law firm that had handled an estate matter “where [Olivares’] interests took second place,” to the attorneys’ fees; and his current law firm represented White in a separate matter involving the Real Estate.⁸ Olivares’ Br. 9.

Prior to the start of the trial, Judge Cates issued the following statement:

I don’t believe I have any connection with either of the parties here.

* * *

[M]y name is David Cates, I’m an attorney with Green and Cates in Syracuse and I am sitting Pro Tem for Judge Sutton today. Ms. White has indicated that she is not aware of any reason for a conflict that I would have in dealing with this matter. Are you aware of any conflict of interests?

(Tr. 3-4). Olivares answered that she was unaware of any conflict of interest and made no objection to Judge Cates’ appointment as judge pro tempore.

Pursuant to Judicial Canon 3(E)(1), “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonable be questioned”

This includes, but is not limited to, instances where

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the procedure; [or]

⁸ According to Olivares, White “reneged” on the agreement to purchase the Real Estate when, at closing, it appeared that a portion of land was not included in the agreement. Olivares’ Br. 2. The parties resolved the dispute with the granting of an easement. Olivares alleges that Judge Cates’ law firm represented White in the easement-related dispute.

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; or the judge has been a material witness concerning it

Ind. Judicial Conduct Canon 3(E).

A judge must of course disqualify from a case upon realizing that the judge's own personal beliefs, values, or opinions are impairing his or her impartiality. Further, Canon 3(E)(1) also requires a judge to disqualify when a judge knows of facts or circumstances that might reasonably call into question the judge's impartiality. This obligation to disqualify exists notwithstanding a judge's earnest, subjective belief that he or she is fully able to perform judicial duties without bias or prejudice.

Voss v. State, 856 N.E.2d 1211, 1220 (Ind. 2006). "The standard is not whether the judge personally believes himself or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality." *In re Morton*, 770 N.E.2d 827, 831 (Ind. 2002).

In this case, Judge Cates neither served as a lawyer in the matter in controversy nor is there any evidence that a lawyer with whom Cates practiced "served . . . as a lawyer concerning the matter" in controversy. Jud. Canon 3(E)(1)(b). Furthermore, there is no evidence, and Olivares does not allege, that Judge Cates was a material witness in the matter in controversy. Thus, we find no basis under Judicial Canon 3(E)(1)(b) upon which to question Judge Cates' impartiality.

Furthermore, contrary to Olivares' assertion, we cannot say that the facts indicate that a reasonable person would have doubted Judge Cates' impartiality. As Olivares raises no reasonable basis to question Judge Cates' impartiality under Judicial Canon 3(E)(1), we find no impropriety in Judge Cates presiding over the trial.

6. Admission of Evidence

Olivares asserts that the trial court abused its discretion in admitting “an unauthenticated, internet download,” which consisted of copies of the Kosciusko County Auditor’s property and tax billing reports for the years 2001 through 2006.

Olivares’ Br. 11. Small Claims Rule 8(A) provides as follows:

The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

The goal of a “quick, less expensive alternative to a full-blown trial . . . would be most compromised by the accretion of procedural and evidentiary regulations, regardless of their merit, which is why the non-substantive rules applicable in small claims proceedings are few indeed.” *Matusky v. Sheffield Square Apartments*, 654 N.E.2d 740, 742 (Ind. 1995) (holding that small claims court judgments may be supported solely by hearsay and residuum rule does not apply).

Due to the informal nature of proceedings in small claims court, we cannot say that the trial court abused its discretion when it admitted White’s exhibit into evidence. *See Stout v. Kokomo Manor Apartments*, 677 N.E.2d 1060, 1067 (Ind. Ct. App. 1997) (finding no error in the small claims court’s admission of exhibits, allegedly containing hearsay statements, confidential information, and settlement offers and claims, into evidence).

7. Motion to Correct Error

Olivares asserts that the trial court erred in “[f]ail[ing] to grant the Motion To Correct Errors [sic] without a hearing and letting it to [sic] be over-ruled by operation of law”⁹ Olivares’ Br. 14. Olivares, however, fails to develop an argument or support it with citations to authority.

Indiana Appellate Rule 46(A)(8) provides in relevant part, “The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on” A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*.

Olivares argues that “a Trial Court cannot, may not or should not decide a motion to correct errors [sic] . . . without a hearing.” Olivares’ Reply Br. 7. Olivares provides no citation to authority or cogent argument. Accordingly, Olivares has waived this issue.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.

⁹ In this case, the trial court did not set a hearing on Olivares’ motion to correct error. Thus, the motion was deemed denied on or about June 30, 2007, or forty-five days after Olivares’ filed the motion. *See* T.R. 53.3(A). Olivares timely initiated an appeal after her motion was deemed denied.